CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 817

THE ROYAL INDEMNITY COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 6, 1941.

CERTIORARI GRANTED APRIL 7, 1941.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 17, 1941.
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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

against

ROYAL INDEMNITY COMPANY, Defendant-Appellant

STATEMENT UNDER RULE 13

This action was commenced by the issuance of a summons on April 27, 1935.

There has been no change of parties or attorneys since the action was commenced, except that Martin Conboy has been succeeded by Lamar Hardy, who has been succeeded by John T. Cahill, attorneys for plaintiff.

The complaint was filed on May 6, 1935.

Defendant's time to answer was extended and answer was filed on June 27, 1935. The facts were agreed to and stipulation of facts duly filed.

Based on the agreed facts plaintiff filed note of issue, notice and motion for summary judgment in its favor on January 24, 1940.

Defendant filed note of issue and counter motion for summary judgment in its favor on January 29, 1940. Plaintiff's motion and defendant's counter motion were heard together before Judge Bondy January 30, 1940. Decision was reserved, and on April 16, 1940 the Court filed its [fol. 2] opinion sustaining motion of plaintiff for summary judgment for $4,169.07 and denied the motion of defendant for a summary judgment in its favor and to dismiss the cause of action.

On April 27, 1940 the Court entered Order and Judgment in favor of plaintiff for $4,169.07 and costs of $22.17.

Defendant filed its notice of appeal on the 1st day of July, 1940.

Plaintiff filed cross-notice of appeal July 2, 1940.

IN DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, Plaintiff,

against

ROYAL INDEMNITY COMPANY, Defendant

COMPLAINT

The plaintiff, by its attorney, Martin Conboy, United States Attorney for the Southern District of New York, complains of the defendant herein and on information and belief alleges:

1. The plaintiff is a sovereign body politic.

[fol. 3] 2. The defendant is a corporation duly organized and existing under and by virtue of the laws of the State of New York, doing business within the Southern District of New York, with an office and principal place of business at 84 William Street, City and County of New York, in the State and Southern District of New York, within the jurisdiction of this Court.

3. This is a suit of a civil nature, founded on contract, arising out of the laws of the United States providing for internal revenue and authorized and sanctioned by the Commissioner of Internal Revenue and the Attorney General of the United States.

4. On or about March 15, 1920, the Commissioner of Internal Revenue assessed against one Walter Moore an additional assessment of income tax for the calendar year 1917 in the amount of $29,128.82.

5. The said additional assessment of income tax for the year 1917 was reported to William H. Edwards, the then Collector of Internal Revenue for the Second Collection District of New York, on the March, 1920 Special No. 47 List, page 45, line 4.

6. Thereafter, on or about May 6, 1920, the said William H. Edwards, being charged with the collection of the additional assessment as aforesaid, served notice and demand on the said Walter Moore for its payment in accordance

with the law then applicable and regulations promulgated thereunder, but no part of the said additional assessment was paid.

7. Thereafter, the said Walter Moore protested the payment of the said additional assessment and in considera- [fol. 4] tion of the said Collector of Internal Revenue refraining from and suspending the collection of the said additional assessment and interest for twelve months pending the consideration and review by the Commissioner of Internal Revenue of an abatement claim filed by the said Walter Moore on or about May 13, 1920, for the abatement of the entire amount of the said additional assessment, said Walter Moore, as principal and the defendant, Royal Indemnity Company, by its Vice-President and Assistant Secretary as surety, executed and delivered to the said William H. Edwards, Collector of Internal Revenue, their bond, signed with their respective names and sealed with the corporate seal of the defendant, whereby the said Walter Moore and the defendant bound themselves, their successors and assigns, jointly and severally, unto William H. Edwards, Collector of Internal Revenue, Second District of New York, and his successors in office, in the sum of $31,000, lawful money of the United States of America, payment well and truly to be made to the Collector of Internal Revenue for the Second District of New York.

8. The said bond was executed and delivered by the defendant to the said William H. Edwards, Collector of Internal Revenue, to secure the payment of taxes due and owing the United States by the said Walter Moore; and the said William H. Edwards is not now Collector of Internal Revenue and the plaintiff, the United States of America, is the real party in interest and entitled to the proceeds of any recovery herein.

A photostat of the said bond is annexed hereto and made a part hereof as if fully rewritten herein and is marked Exhibit A.

9. The said bond contains a condition in substance as follows: whereas the said Walter Moore has been assessed a [fol. 5] tax by the Internal Revenue Department of the United States in the sum of $29,128.82, and whereas he has requested the Collector of Internal Revenue for the Second District of New York to refrain from and suspend the collection thereof and such interest as may accumulate thereon

for 12 months in order that the taxpayer may have an opportunity to pay so much thereof as remains unpaid with interest thereon, now, therefore, the condition of the bond is such that if the said Walter Moore shall pay the balance and the accrued penalties with the interest aforesaid to the Collector at the expiration of the extended period, then the obligation shall be void, otherwise to be in full force and virtue.

10. On or about May 2, 1922, the said Walter Moore and the defendant, executed and delivered unto the Collector of Internal Revenue for the Second Collection District of New York, a second bond in the penal sum of $38,000, containing substantially the same provisions and conditions contained in the first bond hereinabove set forth with the exception of the amount of the penal sum thereof, which said bond is not now in the possession of the plaintiff or any of its officers or employees but is believed to be in the possession of the defendant; and the plaintiff respectfully requests the defendant to produce the said bond or a copy thereof.

11. Upon the filing of the said bonds the said Collector suspended the collection of the said additional assessment and interest while the Commissioner of Internal Revenue duly considered the said claim for abatement, and on March 23, 1925, the said Commissioner of Internal Revenue allowed the claim for the sum of $20,906.15 abating that amount on schedule No. 13412 and rejected the same in the amount of $8,223.67 thereby determining said amount to be due and properly assessed.

[fol. 6] 12. The said Walter Moore was notified of the decision of the Commissioner of Internal Revenue with respect to the rejection of a part of his abatement claim and upon his failure to pay, the then Collector of Internal Revenue made demand upon the defendant for the payment of the amount for which the abatement claim was rejected as aforesaid, with interest.

13. On or about December 18, 1926, the defendant paid to Frank K. Bowers, the then Collector of Internal Revenue for the Second Collection District of New York, the principal amount of the assessment for which the abatement claim was rejected of $8,223.67, but wholly failed, neglected and refused to pay interest then due and owing the United

States of America, in the sum of $4,932.86, computed as follows:

Unabated portion of the tax	$8,223.67
Interest from May 6, 1920 (the date of the original demand) to November 22, 1921 on $8,223.67 at 12%	1,527.58
Interest from November 22, 1921 to February 18, 1925 on $8,223.67 at 6%	1,599.22
Interest from February 18, 1925 to December 18, 1926 (date of payment) at 12% per annum	1,806.06
Total due	$13,156.53
Amount paid	8,223.67
Balance due	$4,932.86

14. On or about September 20, 1932, William Duggan, at that time the Collector of Internal Revenue for the Second Collection District of New York, made demand on the said [fol. 7] Walter Moore by registered letter addressed to his last known address for the sum of $4,932.86, plus statutory interest to date of payment, but such demand was returned "not found," and thereafter, on or about September 23, 1932, the said Collector of Internal Revenue made demand on the defendant that it pay the amount of said interest of $4,932.86, with interest to date of payment, which sum remained due and unpaid as aforesaid, but said defendant wholly failed, neglected and refused to pay and does yet wholly fail, neglect and refuse to pay said amount or any part thereof, in breach of the conditions of the said bonds which had then become and now are absolute.

15. Pursuant to the statute in such cases made and provided, interest accrued and has accrued on said amount of $4,932.86 at the rate of one per centum per month from December 18, 1926, until payment is made in full.

16. By reason of the foregoing, there is justly due the plaintiff from the defendant on account of said outstanding and unpaid interest, the sum of $4,932.86, with interest thereon at one per centum per month from December 18, 1926, until paid.

Wherefore, plaintiff prays judgment against the defendant in the sum of $4,932.86 with interest thereon at one

per centum per month from December 18, 1926, to date of payment, and the costs and disbursements of this action.

Martin Conboy, United States Attorney, Attorney for Plaintiff.

(Verified by Elizabeth Rogers Horan, as Asst. United States Attorney on April 27, 1935.)

[fol. 8] EXHIBIT "A", ATTACHED TO FOREGOING COMPLAINT

Exhibit "A" referred to in the complaint is the bond executed on the 1st day of December, 1920 for $31,000.00, and is not here copied, but a photostatic copy thereof is annexed to the stipulation of facts as Exhibit "A", to which reference is here made.

The second bond for $38,000.00 and referred to in paragraph 10 of the complaint is made a part of this record as Exhibit "B" to stipulation of facts to which reference is here made.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

ANSWER

The defendant Royal Indemnity Company, by its attorney, Harry S. Hall, answering the complaint herein states:

First. The defendant in answering paragraphs 1, 2, 3, 7, 8, 9, 11 and 12 admits the allegations therein contained as being probably true.

Second. The defendant in answering paragraphs 4, 5, 6, 10, 13 and 14 neither admits nor denies the allegations therein contained, but of them demands strict proof.

[fol. 9] Third. The defendant in answering paragraphs 15 and 16 denies the allegations therein contained and says that it is not indebted to the plaintiff for interest or other amount therein alleged and that it is not liable for an accumulation of interest on the interest claimed from December 18, 1926 as a matter of fact or law.

Fourth. In further answering the complaint and more especially the allegations contained in paragraph 13, the defendant denies that it is liable for interest at the rate

of 12% per annum or 1% a month as therein alleged as a matter of fact or law.

Fifth. The defendant in further answering the allegations in paragraph 10 of the complaint denies that it is liable to the plaintiff for the amount sued for or alleged in the complaint or any other amounts; that the defendant has fully paid and satisfied the plaintiff for the amounts sued on in full, and that the bond sued on which the plaintiff says is in the possession of the defendant, was returned to the defendant and cancelled on the payment by the defendant to the plaintiff of the obligation of said bond.

Sixth. In further answering the allegations contained in the complaint, the defendant Royal Indemnity Company comes now and pleads accord and satisfaction of the amount of the claim sued on.

Seventh. Further answering the complaint the defendant says that no amounts are alleged in the complaint for which the plaintiff is entitled to recover.

All allegations herein not specifically admitted or denied are now generally denied.

[fol. 10] Wherefore, defendant demands a judgment dismissing the complaint with costs.

Harry S. Hall, Attorney for Defendant, Royal Indemnity Company, Office & P. O. Address, 51 Chambers Street, New York City.

In United States Distric Court, Southern District of New York

Stipulation of Facts

It is Hereby Stipulated and Agreed by and between the attorneys for the parties hereto that the following are the facts of this action. This stipulation is without waiver of any objections of relevancy or materiality and without prejudice to the submission of further evidence not inconsistent with the facts herein set forth.

1. On or about March 15, 1920, the Commissioner of Internal Revenue assessed against one Walter Moore of the City, County and State of New York, a deficiency of income [fol. 11] tax for the calendar year 1917 in the amount of $29,128.82.

2. The said additional assessment of income tax was duly reported to William H. Edwards, the then Collector of Internal Revenue for the Second District of New York, on the Commissioner's March, 1920 Special No. 47, list, page 45, line 4. On the 6th day of May, 1920, the said Collector of Internal Revenue served notice and demand on the said Walter Moore for payment of the aforesaid additional income tax.

3. The taxpayer, Walter Moore, on receipt of the notice and demand for payment of the tax from the Collector, prepared and filed with the Commissioner of Internal Revenue at Washington a protest and claim in abatement.

4. On December 1, 1920, the taxpayer, Walter Moore, and the defendant Royal Indemnity Company, as surety, executed a bond No. SX-59300 to William H. Edwards, Collector of Internal Revenue, Second District of New York, and to his successor in office, in the sum of $31,000 in consideration of suspension of collection on the part of the Collector and to secure the payment of any tax found by the Commissioner of Internal Revenue to be due on consideration of the claim in abatement. A photostatic copy of the said bond dated December 1, 1920, is annexed hereto as Exhibit A.

5. On the 2nd day of May, 1922, the taxpayer, Walter Moore, and the defendant, Royal Indemnity Company, as surety, executed at the request of the Collector a second bond No. SX-81670 in the sum of $38,000 for the same purpose. The said bond No. SX-81670 superseded, was ac-
[fol. 12] cepted in lieu of and substituted for the first bond No. SX-59300. A photostatic copy of said bond No. SX-81670 is annexed hereto as Exhibit B. The execution of the second bond was considered by the Royal Indemnity Company as a release of the first bond, and no premium was thereafter demanded by it on the first bond.

6. Upon the filing of the said bonds the Collector continued to suspend the collection of the said additional assessment and interest while the Commissioner of Internal Revenue considered the said claim for abatement, and on February 18, 1925, the Commissioner of Internal Revenue allowed the claim in abatement for the sum of $20,906.15, and rejected the same in the amount of $8,223.67, thereby determining said amount to be due and properly assessed.

7. Said Walter Moore was notified of the decision of the Commissioner of Internal Revenue with respect to the rejection of a part of his abatement claim, and upon his failure to pay, the then Collector of Internal Revenue wrote the following letter to the defendant:

"August 5, 1926.

Royal Indemnity Co.,
84 William Street,
New York, N. Y.

Re: Bond of Walter Moore SX 81670 $38,000.00

Demand is hereby made upon you for payment of $14,-555.89 on bond executed by you in the amount of $38,000, May 2, 1922 in behalf of Walter Moore whose address then was 27 Beaver Street, New York.

[fol. 13] Collection of this tax, which is due and payable from the principal, has failed.

Very truly yours, Frank K. Bowers, Collector."

8. Between August 5, 1926 and December 17, 1926, correspondence took place between the defendant and the Collector of Internal Revenue, in which the defendant disputed liability in the sum of $14,555.89.

9. A draft No. B-7877 dated December 17, 1926 in the sum of $8,223.67 was thereafter submitted to the Collector, which draft was accepted by him and paid upon presentation. A copy of the said draft dated December 17, 1926 is annexed hereto as Exhibit C.

10. On December 20, 1926 the Collector returned the bond SX-81670 dated May 2, 1922 in the sum of $38,000 to the defendant, with the following letter:

"New York, December 20, 1926.

Royal Indemnity Co., 84 William Street, New York, N. Y.

GENTLEMEN:

This transmits bond SX 81670—Walter Moore, dated May 2nd, 1922, executed by you in the amount of $38,000.

[fol. 14] All liability under this bond is hereby terminated.

Very truly yours, Frank K. Bowers, Collector."

11. The Royal Indemnity Company on receipt of said letter from the Collector and the bond transmitted therewith closed this case in its files.

12. Thereafter and on or about September 20, 1932 the then Collector of Internal Revenue for the Second District of New York made demand upon Walter Moore upon his bond for payment of $4,119.98 representing interest outstanding on additional income tax for the year 1917. The said demand was returned "not found", and thereafter and on or about September 23, 1932 the said Collector made demand upon the Royal Indemnity Company for payment of the said $4,119.98.

13. The defendant, Royal Indemnity Company, refused to pay the said sum of $4,119.98 or any other amount, and no amount has been paid in discharge of the liability of Walter Moore and the defendant upon the bond SX-81670 dated May 2, 1922 except the amount of $8,223.67 as aforesaid.

Dated, New York, N. Y., January 23, 1940.

John T. Cahill, United States Attorney, Attorney for Plaintiff; Harry S. Hall, Attorney for Defendant.

(Here follow 3 photolithographs, side folios 15, 16, 17-18)

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Exhibit "A" attached to Stipulation of Facts.

Suit No. 1

KNOW ALL MEN BY THESE PRESENTS, That we, WALTER MOORE, New York City, New York, as principal, and the ROYAL INDEMNITY COMPANY, 150 having an office and principal place of business at 84 William Street, Borough of Manhattan, City and County of New York, as surety, are held and firmly bound unto William H. Edwards, Collector of Internal Revenue, Second District of New York, and to his successor in office, in the sum of $58,000.00 Dollars, lawful money of the United States of America, to be paid to the said Collector, to which payment, well and truly to be made said principal and surety bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

SEALED with our seals and dated the 1st day of December, 1920.

WHEREAS, WALTER MOORE the above mentioned principal, has been assessed by the Internal Revenue Department of the United States in the sum of twenty-nine thousand one hundred twenty-eight & 82/100 Dollars, under the Revenue Act of and (List of ; page ; line ,).

Whereas, WALTER MOORE has requested that WILLIAM H. EDWARDS, Collector of Internal Revenue for the Second District of New York, whose duty it is to collect said assessment, to refrain from and suspend the collection thereof and such interest as may accumulate thereon for a period 18 months from date hereof, in order that it may have an opportunity to pay so much thereof as remains unpaid with the interest thereon until paid as required by law, which at the present time amounts to twenty-nine thousand one hundred twenty-eight and 82/100 (29,128.82) Dollars.

Stamp chart
Rate per $100 or fraction
Amount of bond $ 145.00
Date issued
Original or renewal
Date stamps is to be affixed

NOW THEREFORE, THE CONDITION OF THE WITHIN BOND IS SUCH, that if said WALTER MOORE shall pay the balance and the accrued penalties with the interest aforesaid, to the said Collector at the expiration of said extended period, then and in that event, the above application shall be void; otherwise to be in full force and virtue.

WITNESSES: Harold W. Tindle

Walter Moore (15)

ROYAL INDEMNITY COMPANY,

BY [redacted]
RESIDENT VICE-PRESIDENT

ATTEST:

BY [redacted]
ASSISTANT SECRETARY

Bond No. SX-59500
$58000
Rec

[redacted]

15

10A

Exhibit "B" attached to Stipulation of Facts.

ROYAL INDEMNITY COMPANY

CHARLES H. HOLLAND, PRESIDENT

BOND NO. SX -81670

AMOUNT $ 38,000.00

KNOW ALL MEN BY THESE PRESENTS, That we, WALTER MOORE, of 27 Beaver Street, City, County and State of New York, as Principal, and the ROYAL INDEMNITY COMPANY, a corporation organized under the laws of the State of New York, having an office and principal place of business at No.84 William Street, Borough of Manhattan, City and County of New York, as Surety, are held and firmly bound unto FRANK K. BOWERS, Collector of Internal Revenue, Second District of New York, and to his successor in office, in the sum of Thirty-eight thousand and 00/100($38,000.00) Dollars, lawful money of the United States of America, to be paid to the said Collector, to which payment, well and truly to be made, said Principal and Surety bind themselves, their successors and assigns, jointly and severally, firmly by these Presents.

SEALED with our seals and DATED this 2nd day of May, 1928.

WHEREAS, WALTER MOORE, the above mentioned principal, has been assessed by the Internal Revenue Department of the United States in the sum of Twenty-nine thousand one hundred twenty-eight and 82/100 ($29,128.82) Dollars, under the Revenue Act of and (List of page. ; line ; and

WHEREAS, WALTER MOORE has requested that FRANK K. BOWERS, Collector of Internal Revenue for the Second District of New York, whose duty it is to collect said assessment, to refrain from and suspend the collection thereof and such interest as may accumulate thereon for a period of twelve (12) months from date hereof, in order that he may have an opportunity to pay so much thereof as remains unpaid with the interest thereon until paid as required by law, which at the present time amounts to Thirty-seven thousand two hundred eighty-four and 89/100($37,284.89) Dollars.

NOW, THEREFORE, the condition of the within bond is such, That if said WALTER MOORE shall pay the balance and the accrued penalties with the interest aforesaid, to the said Collector at the expiration of said extended period, then and in that event, the above obligation shall be void; otherwise to be in full force and virtue.

WITNESSES:

Walter Moore. (Principal)

ROYAL INDEMNITY COMPANY, Wm. W. Lafferty

By Resident Vice-President

M. A. Petit

Resident Assistant Secretary

Executed in Duplicate.

16

hec

10B

Exhibit "C" attached to Stipulation of Facts.

ROYAL

BONDING CLAIMS DEPARTMENT No. B 7877
HEAD O/FICE: NEW YORK

December 17 1926 19

Pay to the order of Collector of Internal Revenue

XXX EIGHTY TWO HUNDRED TWENTY THREE 67/100XXXXXXX DOLLARS

IN FULL PAYMENT OF THE CLAIM OR ACCOUNT STATED BELOW

To ROYAL INDEMNITY COMPANY through The New York Trust Company NEW YORK, N. Y.

$ 8223.67

THE ENDORSEMENT OF THIS DRAFT CONSTITUTES A RELEASE AND RECEIPT IN FULL PAYMENT OF THE FOLLOWING CLAIM OR ACCOUNT (IF INCORRECT RETURN WITHOUT ALTERATION)

FILE NO.	BOND NO.	CLAIM NO.	INSURED	PRINCIPAL
107283	SX 8167 0	11033	U. S.	Walter Moore

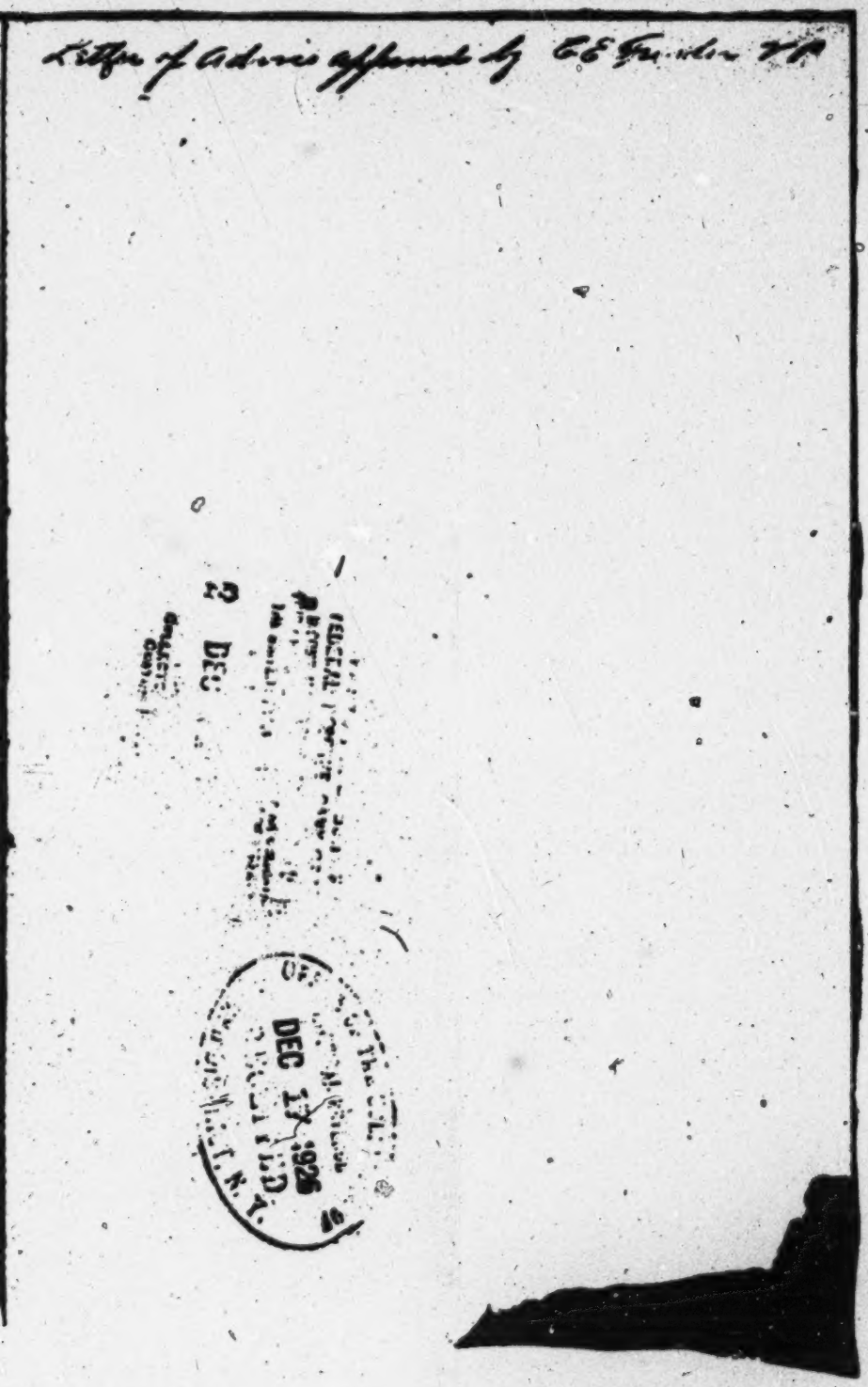
PARTICULARS:

In full settlement of all taxes assessed for the period of the calendar year 1917 and in full settlement of all liability under bond SX 81670, Walter Moore principal

DEC 18 1926 FEDERAL RESERVE BANK

Letter of Advice effected by C.E. Franklin Ltd

17-18



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[fol. 19] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

NOTICE AND MOTION FOR SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF

SIR:

Please take notice that upon the complaint and answer in the above entitled action and upon the stipulation of facts dated January 23, 1940, the undersigned will move this Court for judgment in favor of the plaintiff at a stated term for the hearing of motions to be held in and for the Southern District of New York at room 506, United States Court House, Borough of Manhattan, City of New York, on the 30th day of January, 1940, at 10:30 in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: New York, N. Y., January 23, 1940.

Yours, etc., John T. Cahill, United States Attorney for the Southern District of New York, Attorney for the Plaintiff, Office & P. O. Address, United States Court House, Foley Square, New York, N. Y.

To: Harry S. Hall, Esq., Attorney for the Defendant, 51 Chambers Street, New York, N. Y.

[fol. 20] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

NOTICE OF COUNTER MOTION AND COUNTER MOTION FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

SIR:

Please take notice that upon the complaint and answer in the above entitled action and a stipulation of facts dated January 23, 1940, the undersigned will move this Court for judgment in favor of the defendant to dismiss a cause of action at a stated term for the hearing of motions to be held in and for the Southern District of New York at Room 506, United States Court House, Borough of Manhattan, City of New York, on the 30th day of January, 1940, at 10:30 in the forenoon of that date or as soon thereafter as counsel can be heard.

Dated, New York, N. Y., January 29, 1940.

Yours, etc., Harry S. Hall, Attorney for Defendant, Royal Indemnity Company, Office & P. O. Address, 51 Chambers Street, New York City, N. Y.

To: John T. Cahill, United States Attorney, United States Court House, Foley Square, New York, N. Y.

[fol. 21] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

DEFENDANT'S COUNTER MOTION FOR SUMMARY JUDGMENT

Comes now the defendant, Royal Indemnity Company by its Attorney of Record and moves the Court to disallow the motion of the plaintiff for summary judgment; and further moves the Court to dismiss the cause of action because as a matter of law the plaintiff is not entitled to recover. The said motion is based upon the complaint and answer and the stipulation of facts dated January 23, 1940.

Respectfully, Harry S. Hall, Attorney for Defendant, Royal Indemnity Company, Office & P. O. Address, 51 Chambers Street, New York City, N. Y.

[fol. 22] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

OPINION OF BONDY, J.

BONDY, District Judge:

The defendant does not seriously dispute that under the terms of its bond it assumed liability for interest accruing upon the deficiency determined by the Commissioner after consideration of the taxpayer's claim in abatement. It contends that the collector nevertheless had authority to terminate its liability under the bond and that the government's only recourse is to the official bond given by the collector to secure the faithful performance of his duties.

The facts herein have been stipulated and both parties agree that the only substantial question of law is whether the United States is bound by the act of the collector in returning the bond to the defendant with a letter stating that all liability thereunder was terminated.

While the obligee named in the bond is Frank K. Bowers, Collector of Internal Revenue for the Second District of New York and his successor in office, it is apparent that the bond was not intended merely for the personal benefit of the collector, but was also designed to secure the payment of any tax found due, as the stipulation of facts expressly [fol. 23] states. Accordingly the United States is the real

party in interest and is entitled to bring suit upon the bond. Hilton Lumber Co. v. Grissom, 70 F. (2d) 892, certiorari denied 293 U. S. 613; United States v. Jureidini, 35 F. (2d) 57; cf. Gulf States Steel Co. v. United States, 287 U. S. 32. It is immaterial that there was no express statutory authority for the collector to accept the bond. United States v. Fidelity & Deposit Co., 80 F. (2d) 24, certiorari denied 298 U. S. 665; United States v. Wolper, 36 F. (2d) 715.

Since the bond obligated the defendant to pay interest, the collector had no authority to compromise the defendant's liability to the United States as the real obligee of the bond, by foregoing the payment of accrued interest. Hughson v. United States, 59 F. (2d) 17, 19, certiorari denied 287 U. S. 630; United States v. Steinberg, 100 F. (2d) 124, 126; cf. Botany Worsted Mills v. United States, 278 U. S. 282. The collector's act is not binding on the United States. See United States v. Globe Indemnity Co., 94 F. (2d) 576, certiorari denied 304 U. S. 575; Wilber National Bank v. United States, 294 U. S. 120, 123.

It is not significant that an action may be maintained upon the collector's official bond. The existence of such a right of action does not confer authority upon the collector to bind the United States.

The defendant does not dispute that the accrued interest owing on December 17, 1926, the day the defendant paid the principal amount of the tax deficiency, was $4,169.07. The plaintiff, however, is not entitled to recover interest upon the accrued interest in the absence of agreement or statute. Cherokee Nation v. United States, 270 U. S. 476, 490; Young v. Hill, 67 N. Y. 162, 167; 5 Williston, Contracts (Rev. Ed.) Section 1417. Moreover, the exaction from the defendant of interest upon the accrued interest would be inequitable in [fol. 24] view of the collector's action in returning the bond to the defendant with the statement that all liability thereunder was terminated, despite the fact that his action does not bar the recovery of the accrued interest, and in view of the delay in the institution of this action. See Board of County Commissioners, Jackson County, Kansas v. United States, 308 U. S. 343, 350, 352.

The defendant's motion for summary judgment accordingly is denied and the plaintiff's motion granted in the amount of $4,169.07.

April 15, 1940.

Wm. Bondy, United States District Judge.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

ORDER AND JUDGMENT

The plaintiff herein having moved this Court for summary judgment against the defendant in the sum of $4,169.07 together with interest at 6% per annum from December 17, 1926 and costs and disbursements, according to law, and the defendant having moved this Court for judgment in its favor dismissing the complaint upon the hearing of the plaintiff's motion for summary judgment, and said mo- [fol. 25] tions having come on to be heard before the Honorable William Bondy, one of the Judges of this Court, on January 30, 1940, and John T. Cahill, United States Attorney for the Southern District of New York, by Noel Hemmendinger, Assistant United States Attorney, having been heard in support of the plaintiff's motion, and Harry S. Hall, Esq., attorney for the defendant, having been heard in opposition thereto, and in support of the defendant's motion, and due deliberation having been had, and this Court having handed down its memorandum decision dated April 15, 1940,

Now, on motion of John T. Cahill, United States Attorney for the Southern District of New York, attorney for the defendant, it is hereby

Ordered, adjudged and decreed that the plaintiff's motion for summary judgment be and the same hereby is granted in the sum of $4,169.07 together with costs, but without interest, and in all other respects be and the same hereby is denied; and it is

Further ordered, adjudged and decreed that the defendant's motion for summary judgment be and the same hereby is denied, and it is

Further ordered, adjudged and decreed that the plaintiff recover from the Royal Indemnity Company, the defendant, the sum of $4,169.07, together with $22.12 costs as taxed, and that execution issue therefor.

Dated, New York, N. Y., April 26, 1940.

Approved.

Bondy, U. S. D. J.

Judgment rendered April 27, 1940.

George J. H. Follmer, Clerk.

[fol. 26] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

NOTICE OF APPEAL OF DEFENDANT

SIR:

Please take notice that the defendant in the above action hereby appeals to the Circuit Court of Appeals for the Second Circuit from the order and judgment of this Court entered April 27, 1940, that the plaintiff recover from the defendant the sum of $4,169.07.

Dated, New York, N. Y., July 1, 1940.

Harry S. Hall, Attorney for Defendant, Royal Indemnity Company, Office & P. O. Address, 51 Chambers Street, New York, N. Y.

To: John T. Cahill, United States Attorney for the Southern District of New York, Attorney for Plaintiff.

[fol. 27] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

CROSS NOTICE OF APPEAL OF PLAINTIFF

SIR:

Please take notice that the plaintiff in the above entitled action hereby appeals to the Circuit Court of Appeals for the Second Circuit from so much of the judgment of this court entered April 27, 1940 as denies the claim of the plaintiff for interest.

Dated, New York, N. Y., July 2, 1940.

Yours, etc., John T. Cahill, United States Attorney for the Southern District of New York, Attorney for Plaintiff, Office & P. O. Address, United States Courthouse, Foley Square, New York, N. Y.

To: Harry S. Hall, Esq., Attorney for Defendant, 51 Chambers Street, New York, N. Y.

[fol. 28] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

STIPULATION AS TO THE RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the District Court in the above entitled matter as agreed upon by the parties.

Dated, New York, August 9, 1940.

Harry S. Hall, Attorney for Defendant. John T. Cahill, United States Attorney for the Southern District of New York.

[fol. 29] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 30] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 69—October Term, 1940

Argued October 23, 1940 Decided December 9, 1940

UNITED STATES OF AMERICA, Plaintiff-Appellant,

vs.

ROYAL INDEMNITY COMPANY, Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

From a judgment for the United States in an action against the surety on a bond given to a collector of internal revenue to secure payment of income taxes, both parties have appealed. Judgment modified.

Before: Swan, Chase and Clark, Circuit Judges.

Harry S. Hall, Attorney for defendant-appellant.

John T. Cahill, United States Attorney for plaintiff-appellant; Edward J. Ennis, Assistant U. S. Attorney, of counsel.

[fol. 31] SWAN, Circuit Judge:

This is an action by the United States against the surety on a bond given by a taxpayer as principal to a collector of internal revenue as obligee. The bond, dated May 2, 1922, for $38,000 was given in order to obtain suspension of collection of an income tax deficiency for the year 1917, as to which the taxpayer had filed with the commissioner of internal revenue a claim in abatement. It was conditioned on payment of so much of the deficiency as should not be abated, with interest thereon.

In 1925 the commissioner allowed in part the taxpayer's claim in abatement and rejected it in the amount of $8,223.67. Demand for payment of this sum plus interest (a total of some $14,500) was made on the taxpayer and, upon his default, on the surety. The latter disputed the amount of its liability. On December 17, 1926 it tendered the collector a draft for $8,223.67, representing the unabated deficiency alone without interest. This draft bore on its face a

notation that it was in full settlement of the taxes for 1917 and of all liability under the bond. The draft was collected, and on December 20, 1926 the collector returned the bond to the surety with a letter stating: "All liability under this bond is hereby terminated." Thereafter, in 1932, the then collector demanded from the surety payment of the interest on the unabated deficiency of $8,223.67. Payment being refused, this action was commenced on April 27, 1935. Upon complaint, answer and stipulated facts, each party moved for summary judgment. The district judge gave judgment for the plaintiff in the sum of $4,169.07 representing the interest on the deficiency to December 17, 1926, but denied any recovery of interest on this amount. Both parties have appealed, the defendant contending that the collector's release prevents any recovery, and the plaintiff challenging denial of interest on the sum found due under the bond on December 17, 1926.

[fol. 32] On the defendant's appeal the sole question is whether the collector had implied authority to release the bond. He had implied authority to accept the bond. United States v. Wolper, 86 F. 2d 715, 717 (C. C. A. 2). Having implied authority to accept it, the argument is urged that logically he must have implied authority to release it. This does not follow. Authority to do acts beneficial to the government in the collection of taxes may be implied, but it is well recognized that subordinate officials cannot surrender rights of the United States without express authority so to do. Hart v. United States, 95 U. S. 316, 318; United States v. Globe Indemnity Co., 94 F. 2d 576 (C. C. A. 2); Ritter v. United States, 28 F. 2d 265, 267 (C. C. A. 3). On December 17, 1926 the principal and surety were liable under their bond for the deficiency tax of $8,223.67 and interest thereon of $4,169.07. Only the commissioner, with the consent of the Secretary of the Treasury, was authorized to compromise the tax deficiency for a sum less than was legally due. Rev. Stat. §3229 (26 U. S. C. A. §1661, 1935 ed.); Botany Mills v. United States, 278 U. S. 282, 288; L. Loewy & Son v. Commissioner, 31 F. 2d 652, 654 (C. C. A. 2); 45 Treas. Reg. Art. 1011 (1918 Act). If the collector was not authorized to compromise the taxpayer's liability for the tax, there is no reason to suppose he would have authority to compromise the contractual liability of the obligors of the bond to pay such tax, or to release it by returning the bond.

Two cases seem to support the taxpayer's position. In Brewerton v. United States, 9 F. Supp. 503, the Court of Claims ruled that a bond taken by a collector could be released by him. In so holding it purported to follow United States v. Alexander, 110 U. S. 325. This was a misapplication of the Alexander case for there the cancellation of the warehouse bond was done by the Secretary of the Treasury pursuant to express statutory authority; no question of implied authority was involved. In Heinemann Chemical Co. [fol. 33] v. United States, 92 F. 2d 302, the third circuit followed the Court of Claims and similarly misapplied the Alexander case. With due respect, we are unable to agree with the Brewerton and Heinemann decisions. For reasons already stated we think the collector was without authority to release the defendant's liability by returning its bond with the statement that liability thereon was terminated. Nothing in our own decision in United States v. Globe Indemnity Co., 94 F. 2d 576, is to the contrary; indeed it tends to support the view now expressed.

Upon the plaintiff's appeal it is urged that interest should have been allowed upon the amount found due from the defendant December 17, 1926. The district judge regarded it as a claim for interest upon interest, and thought it inequitable to allow it under the circumstances. This is not a case of interest upon interest; the surety's liability was an obligation undertaken by contract to pay $4,169.07 more than it actually paid on December 17, 1926. In New York breach of contract to pay a liquidated sum normally carries interest at 6 per cent per annum to the date of judgment. New York Gen. Bus. Law, §370. How equities have anything to do with the application of this rule we fail to see. Nor do we find anything inequitable in charging a surety interest for his own default—particularly since the surety is chargeable with notice that a collector has no power to release the government's rights, and has had the use of the money which should have been paid to the collector when due. See United States v. U. S. Fidelity & Guaranty Co., 236 U. S. 512, 528. At least three circuits have decided in favor of the allowance of interest under similar circumstances. Maryland Casualty Co. v. United States, 76 F. 2d 626 (C. C. A. 5); United States v. Hamilton, 96 F. 2d 878 (C. C. A. 7); Mass. Bonding & Ins. Co. v. United States, 97 F. 2d 879 (C. C. A. 9). The cases cited to the contrary relate to non-analogous situations.

[fol. 34] On the defendant's appeal the judgment should be affirmed; on the plaintiff's appeal it should be modified to include interest at the rate of 6 per cent per annum from December 17, 1926, and, thus modified, affirmed. It is so ordered.

[fol. 35] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 26th day of December, one thousand nine hundred and forty.

Present: Hon. Thomas W. Swan, Hon. Harrie B. Chase, Hon. Charles E. Clark, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellant,

v.

ROYAL INDEMNITY COMPANY, Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court on the defendant's appeal be and it hereby is affirmed; on the plaintiff's appeal said judgment is modified to include interest at the rate of 6% per annum from December 17, 1926, and, thus modified, is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 36] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States v. Royal Indemnity Company. Order for Mandate. United States Circuit Court of Appeals. Filed Dec. 26, 1940. D. E. Roberts, Clerk, Second Circuit.

[fol. 37] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 38] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 7, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 45,166. U. S. Circuit Court of Appeals, Second Circuit. Term No. 817. The Royal Indemnity Company, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed March 6, 1941. Term No. 817, O. T. 1940.